No. _____

In the Supreme Court of the United States

DONALD J. BEARDSLEE, Petitioner,

v.

JILL BROWN, Warden of California State Prison at San Quentin, Respondent.

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

EMERGENCY MOTION FOR A STAY OF EXECUTION; APPENDIX

STAY OF EXECUTION REQUESTED

EXECUTION IMMINENT: JANUARY 19, 2005

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TO THE HONORABLE SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Petitioner Donald J. Beardslee respectfully requests an order staying his execution, currently scheduled for 12:01 a.m., on Wednesday, January 19, 2005, pending final resolution of the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

ORDER AND OPINION BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying Mr. Beardslee's Motion for a Stay of Execution is Order, Case No. 01-99007 (9th Cir. Jan. 12, 2005). The Ninth Circuit's decision denying Mr. Beardslee relief on Claim Thirty-Nine is a published opinion in *Beardslee v. Brown*, slip op., Appendix 2.

STATEMENT OF THE CASE

Mr. Beardslee is confined in San Quentin State Prison pursuant to a judgment and sentence of death rendered in San Mateo County Superior Court, Case Number C10632 on March 13, 1984. The California Supreme Court affirmed Mr. Beardslee's judgment and sentence on March 25, 1991. *People v. Beardslee*, 53 Cal.3d 68 (1991). Thereafter, Mr. Beardslee sought relief in federal habeas corpus proceedings. Following an evidentiary hearing, the district court denied relief, and the Ninth Circuit affirmed the judgment. *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir. 2004). On October 4, 2004, this Court denied Mr. Beardslee's petition for writ of certiorari regarding his federal habeas claims.[1]

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[1] On October 12, 2004, the Ninth Circuit granted Mr. Beardslee's request to stay the mandate so that he could petition this Court for rehearing from the order denying his petition for writ of certiorari. On October 29, 2004, Mr. Beardslee filed a motion for reconsideration of the

On October 14, 2004, the California Supreme Court stayed the setting of an execution date and appointed the Habeas Corpus Resource Center to represent Mr. Beardslee in all further state post-conviction proceedings, including any executive clemency proceedings. That stay remained in effect until November 22, 2004.

On November 23, 2004, while the motion for reconsideration was pending in this Court, Mr. Beardslee filed a Motion To Stay The Mandate And Renewed Motion For Certificate Of Appealability On Claim Thirty-Nine in the Ninth Circuit Court of Appeals. By that motion, Mr. Beardslee argued that intervening Ninth Circuit authority required the court to consider for the first time his claim that his death sentence was tainted by the penalty jury's consideration of three invalid aggravating factors.[2]

On December 2, 2004, the State of California, through the San Mateo County District Attorney, noticed a hearing for December 16, 2004, to set an execution date for Mr. Beardslee. At that time, the State indicated its intention to request an execution date of January 25, 2004. On December 7, 2004, Mr. Beardslee filed, in the San Mateo County Superior Court, a Motion to Vacate and Continue the December 16, 2004 Hearing Date. The motion was premised in part on the Ninth Circuit Court of Appeals' ongoing consideration of the Motion to Stay the Mandate. On the same day, the Attorney General filed an opposition. On the morning of December 8, 2004, the San Mateo County Superior Court heard and denied Mr. Beardslee's Motion to Vacate.

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denial of his writ for certiorari, which this Court denied on November 29, 2004.

[2] On July 8, 2004, the Ninth Circuit issued its decision in *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004), and subsequently denied the State's request for rehearing and rehearing en banc on October 13, 2004. In *Sanders*, the Ninth Circuit determined for the first time that California's 1978 death penalty statute constitutes a weighing process and thus is subject to the strictures of *Clemons v. Mississippi*, 494 U.S. 738 (1990). Applying *Clemons*, the Ninth Circuit granted relief to Mr. Sanders.

After the hearing, the State of California Attorney General informed counsel for Mr. Beardslee that, rather than seeking an execution date of January 25, 2005, the State planned to seek an execution date of January 19, 2005, six days earlier than that which the State had previously represented.

Following the superior court's denial of the Motion to Vacate, on December 8, 2004, the Ninth Circuit issued an order finding that Mr. Beardslee had demonstrated the existence of "exceptional circumstances" justifying a stay of the mandate to permit the court to hear oral argument on his renewed motion for a certificate of appealability, and setting the matter for oral argument on December 15, 2004. Order Granting Certificate for Appealability on Claim Thirty-Nine, filed December 16, 2004.[3] On December 15, 2004, oral argument was heard in the Ninth Circuit. The next day, on December 16, 2004, the San Mateo Superior Court scheduled Mr. Beardslee's execution for Wednesday, January 19, 2005, denying counsel's request to set the execution date sixty days from that date so as to permit orderly federal review. Later that day, the Ninth Circuit issued a Certificate of Appealability on Claim Thirty-Nine and ordered expedited briefing. Both parties completed a full round of briefing seven days later, on December 23, 2004.

The Ninth Circuit held oral argument on December 28, 2004. On December 29, 2004,

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[3] Following the issuance of the Ninth Circuit's order, Mr. Beardslee renewed his attempts in state court to vacate the setting of the execution date. On the afternoon of December 8, 2004, counsel informed the San Mateo County Superior Court of the Ninth Circuit's order and, with the concurrence of the Attorney General, requested the superior court to calendar reconsideration of the Motion to Vacate for December 9, 2004. The superior court denied the request.

On December 13, 2004, Mr. Beardslee filed an Emergency Motion For Stay Of Execution And December 16, 2004 Hearing To Set Execution Date in the California Supreme Court. Respondent filed an Opposition on December 14, 2004, Mr. Beardslee replied that same day, and the California Supreme Court denied it also on that same day.

the Ninth Circuit issued a supplemental opinion denying relief on Claim Thirty-Nine and affirming the judgment of the District Court. *Beardslee v. Brown*, slip op., Case No. 01-99007, filed December 29, 2004, App. 2. On January 5, 2005, Mr. Beardslee timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which the Ninth Circuit denied on January 6, 2005. On January 11, 2005, Mr. Beardslee filed an Emergency Application For Stay Of Execution To Permit Preparation Of Writ Of Certiorari in the Ninth Circuit, which the court denied on January 12, 2005. App. 3.

REASONS FOR GRANTING THE STAY OF EXECUTION

THE COURT SHOULD STAY MR. BEARDSLEE'S EXECUTION TO PERMIT MEASURED AND FINAL RESOLUTION OF THE PETITION FOR WRIT OF CERTIORARI

Mr. Beardslee seeks *certiorari* review of the Ninth Circuit's opinion – litigated under extraordinary time constraints largely created by the State's determination to expedite Mr. Beardslee's execution – and raises three questions that afford this Court with the opportunity to resolve definitively the appropriate standards governing state and federal appellate review of Eighth Amendment error stemming from the consideration of invalid aggravating circumstances by a penalty phase jury. Singly and cumulatively, these questions justify exercising this Court's authority to stay an execution under 28 U.S.C. section 2251.

Under *Barefoot v. Estelle*, 463 U.S. 880 (1983), Mr. Beardslee must show "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction," "a significant possibility of reversal of the lower court's decision," and "a likelihood that irreparable harm will result if that decision is not stayed" to warrant a stay. *Id.* at 895. This standard is satisfied when Mr. Beardslee "'demonstrate[s] that the issues are debatable among jurists of reason'" and that

the issues are "'adequate to deserve encouragement to proceed further.'" *Lozado v. Deeds*, 498 U.S. 53 (1991) (quoting *Barefoot*, 463 U.S. at 893 n.4). As this Court has held, once a habeas petitioner presents "a question of some substance, 'or a substantial showing of the denial of [a] federal right,'" he or she is entitled to a "stay to prevent the case from becoming moot." *Barefoot*, 463 U.S. at 893 & n.4; *see also McFarland v. Scott*, 512 U.S. 849, 858 (1994).

The Ninth Circuit's determination that a certificate of appealability was warranted on Claim Thirty-Nine entitles Mr. Beardslee to a stay. Order Granting Certificate for Appealability on Claim Thirty-Nine, filed December 16, 2004, App. 1. As the Ninth Circuit noted in its order, Mr. Beardslee established that Claim Thirty-Nine was virtually identical in constitutional dimensions to the claim accorded relief in *Sanders*, such that "[r]easonable jurists could debate whether, in light of the record as a whole, the three invalid special circumstances had a substantial and injurious effect or influence on the jury's death penalty verdict and therefore whether the error was not harmless." *Id.* at 4 (quotations omitted). The ultimate question of whether the Ninth Circuit correctly applied *Clemons* to Claim Thirty-Nine is currently before this Court in the Petition for Writ of Certiorari. Moreover, a stay is warranted because at the December 15, 2004 oral argument in Mr. Beardslee's case, counsel for respondent stated that the State of California has sought this Court's review of *Sanders v. Woodford*, which necessarily will raise questions relating to the appropriateness of the Ninth Circuit's resolution of Mr. Beardslee's claim.

CONCLUSION

For these reasons, a stay of execution should be entered to permit review and consideration of the important constitutional issues raised in the Petition for Writ of Certiorari.

Respectfully submitted,

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January 13, 2005

No. _____

In the Supreme Court of the United States

DONALD J. BEARDSLEE, *Petitioner*,

v.

JILL BROWN, Warden of California State Prison at San Quentin, *Respondent*.

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

APPENDIX IN SUPPORT OF
EMERGENCY MOTION FOR A STAY OF EXECUTION

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Appendix in Support of Emergency Motion for a Stay of Execution

Appendix #	Document
1	Order Granting Certificate for Appealability on Claim Thirty-Nine, filed December 16, 2004
2	*Beardslee v. Brown*, slip op., Case No. 01-99007, filed December 29, 2004
3	Order Denying Emergency Motion for Stay of Execution, filed January 12, 2005

APPENDIX 1

FOR PUBLICATION

FILED

DEC 16 2004

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD BEARDSLEE,

Petitioner - Appellant,

v.

JILL BROWN, Warden of the California State Prison at San Quentin,*

Respondent - Appellee.

No. 01-99007

D.C. No. CV-92-03990-SBA

ORDER

Before: TASHIMA, THOMAS, and PAEZ, Circuit Judges.

In *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir. 2004), we affirmed the denial of federal habeas relief in this capital case. Subsequently, the Supreme Court denied Beardslee's petition for a writ of certiorari. *Beardslee v. Brown*, 125 S. Ct. 281 (2004). Beardslee has now requested the issuance of a certificate of appealability ("COA"), arguing that he is entitled to relief pursuant to *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004), a decision that was issued by another panel of this Court during the pendency of his petition for a writ of certiorari. This

* Pursuant to Fed. R. Civ. P. 43(c)(2), we *sua sponte* substitute Jill Brown for Jeanne Woodward as the respondent in this action.

case is in an unusual posture because Beardslee's request was made after the Supreme Court denied his petition for a writ of certiorari, but before this Court's issuance of the mandate.

We previously granted Beardslee's motion for an order temporarily staying issuance of the mandate. As we noted in that order, "a circuit court has the inherent power to stay its mandate following the Supreme Court's denial of certiorari." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989). "An appellate court's decision is not final until its mandate issues." *Id.* (quoting *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988)). Until the mandate issues, a circuit court retains jurisdiction of the case and may modify or rescind its opinion. *See Thompson v. Bell*, 373 F.3d 688, 691–92 (6th Cir. 2004) (holding that after certiorari is denied but before mandate issues, the court of appeals has jurisdiction to reopen the appeal), *petition for cert. filed*, 73 USLW 3259 (October 14, 2004); *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004).

This inherent authority is not undercut by the time limits specified in Fed. R. App. P. 41(b). *See Bryant*, 886 F.2d at 1529. However, the rule's provision that the mandate issue on the denial of certiorari creates a "threshold requirement of exceptional circumstances before the mandate would be stayed." *Id.* Ordinarily, a request for a COA at this late date would not justify staying issuance of the

mandate. However, in staying issuance of the mandate, we agreed with the Fourth Circuit that an intervening change in the law is an exceptional circumstance that may warrant the amendment of an opinion on remand after denial of a writ of certiorari. *Alphin v. Hensen*, 552 F.2d 1033, 1035 (4th Cir. 1977).

We agree with the State's position at oral argument that, once the threshold standard of exceptional circumstances has been satisfied warranting a temporary stay of the mandate, the usual standard for issuing a COA applies. The standard for granting a COA "is relatively low." *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002) (citing *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). In order to obtain a COA, the petitioner must show only that reasonable jurists could debate whether the petition should have been resolved differently or that the issues presented deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The COA ruling is not, however, an "adjudication of the actual merits" of petitioner's claim. *Id.* at 336–37 (citing 28 U.S.C. § 2253). Indeed, as the Supreme Court has cautioned us:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.

Id.

After undertaking "an overview of the claim[]" and "a general assessment of [its]," *id.*, we conclude that Beardslee has satisfied the relatively low standard for the issuance of a COA. In *Sanders*, we determined that the California Supreme Court, after invalidating two of four special circumstances, had failed to reweigh the mitigating and aggravating factors or apply the correct harmless error standard. 373 F.3d at 1063. Because we were unable to conclude that the invalid special circumstances did not have a substantial or injurious effect or influence on the jury's choice of sentence, we granted Sanders relief as to his sentence. *Id.*

In the case before us, the California Supreme Court invalidated three of Beardslee's four special circumstances. *See People v. Beardslee*, 53 Cal.3d 68, 117 (1991). As in *Sanders*, the California Supreme Court in *Beardslee* did not review the special circumstances error under the harmless beyond a reasonable doubt standard. *See id.*; *cf. Sanders*, 373 F.3d at 1063; *see also People v. Sanders*, 51 Cal.3d 471, 521 (1990). Therefore, "[r]easonable jurists could debate whether, 'in light of the record as a whole,' the three invalid special circumstances had a 'substantial and injurious effect or influence' on the jury's death penalty verdict and therefore whether the error was not harmless." *See Sanders*, 373 F.3d at 1060, 1064-65 (applying *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), harmless-error standard where California Supreme Court failed to conduct an

"adequate, independent" review of the effect of an invalid special circumstance). In view of the change in the law caused by *Sanders*, the issue presented deserves encouragement to proceed further.

Thus, we grant the request for a certificate of appealability as to claim 39 raised in the habeas petition, and specifically as to whether Beardslee is entitled to relief on that claim based upon our intervening decision in *Sanders*. *See* 28 U.S.C. § 2253(c)(2).

Although we have determined that exceptional circumstances exist justifying a temporary stay of the issuance of the mandate, we also recognize the need to resolve the merits of the claim expeditiously. Therefore, we order the parties to file simultaneous briefs on the merits on or before December 20, 2004, and simultaneous reply briefs on or before December 23, 2004. The opening briefs shall be no longer than 30 pages or 14,000 words, whichever is greater. The reply briefs shall be no longer than 15 pages or 7,000 words, whichever is greater.

By issuing this order, we express no opinion on the merits of the claim.

IT IS SO ORDERED.

APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD BEARDSLEE,

Petitioner - Appellant,

v.

JILL BROWN, Warden, of the California State Prison at San Quentin,

Respondent - Appellee.

No. 01-99007

D.C. No. CV-92-03990-SBA

SUPPLEMENTAL OPINION

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Argued and Submitted December 28, 2004
Pasadena, California
Filed: December 29, 2004

Before: TASHIMA, THOMAS and PAEZ, Circuit Judges.

Opinion by Judge Sidney R. Thomas

THOMAS, Circuit Judge:

Donald Beardslee seeks federal habeas relief pursuant to *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004), a decision recently issued by this Court.

Beardslee was convicted by a jury in San Mateo County, California, of two counts of first degree murder with special circumstances and sentenced to death. The California Supreme Court affirmed his conviction and sentence. *People v. Beardslee*, 806 P.2d 1311 (Cal. 1991) ("*Beardslee I*"). Beardslee filed a habeas corpus petition in federal district court. The district court rejected each of his claims and dismissed the petition. We affirmed the district court's denial of habeas relief, *see Beardslee v. Woodford*, 358 F.3d 560 (9th Cir. 2004), and the Supreme Court denied Beardslee's petition for a writ of certiorari, *see Beardslee v. Brown*, 125 S. Ct. 281 (2004).

After denial of certiorari, but before the mandate was issued, Beardslee requested the issuance of an expanded certificate of appealability, arguing that he is entitled to relief under our decision in *Sanders*, a decision that was issued during the pendency of his petition for a writ of certiorari. In *Sanders*, we determined that the California Supreme Court, after invalidating two of four special circumstances, had failed to reweigh the mitigating and aggravating factors considered by the jury in imposing a death sentence or apply the correct harmless error standard. 373 F.3d at 1063. We held that this error had a substantial and injurious effect on the jury's verdict, and thus granted the writ. *Id.* at 1067-68 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)).

In the case before us, the California Supreme Court invalidated three of Beardslee's four special circumstances. *See Beardslee I*, 806 P.2d at 1324-38. As in *Sanders*, the California Supreme Court did not review the effect of the special circumstances error on the jury's verdict under the harmless beyond a reasonable doubt standard. *See id.*; *cf. Sanders*, 373 F.3d at 1063; *see also People v. Sanders*, 767 P.2d 561, 590 (Cal. 1990). We concluded that "[r]easonable jurists could debate whether, 'in light of the record as a whole,' the three invalid special circumstances had a 'substantial and injurious effect or influence' on the jury's death penalty verdict and therefore whether the error was not harmless." *Beardslee v. Brown*, 2004 WL 2965969, at *2 (9th Cir. Dec. 16, 2004) (applying *Brecht*, 507 U.S. at 638, harmless-error standard). In view of the change in the law caused by *Sanders*, we granted a temporary stay of the issuance of the mandate and, after briefing and oral argument, granted a certificate of appealability on the *Sanders* issue. *Id.* While this matter was pending, the State sought and obtained an execution date of January 19, 2005.

In view of the execution date, we ordered expedited briefing and oral argument.[1] After consideration of the briefs, oral argument, and the record, we

[1] Although the parties were under significant time pressure, both parties supplied thorough and thoughtful briefs and made excellent oral presentations.

(continued...)

conclude that, although the jury was instructed that it should consider the invalid special circumstances findings in its penalty determination, this error did not have a substantial and injurious effect on the verdict. Therefore, we deny relief and again affirm the judgment of the district court.

I

The essential facts of this case were described in our initial opinion, 358 F.3d at 565-68, and in the opinion of the California Supreme Court, 806 P.2d at 1315-1318. While on parole for a murder in Missouri, Beardslee was charged with and convicted of the first degree murders of Paula (Patty) Geddling and Stacy Benjamin with premeditation and deliberation pursuant to Cal. Pen. Code, §§ 187, 189. The jury also found the special circumstances of concurrent conviction of multiple murders, *id.* at § 190.2 (a)(3), and intentional killing for the purpose of preventing the victim from testifying as a witness to a separate crime *id.* at § 190.2 (a)(10), true for each victim. A separate jury was empaneled for the penalty phase trial. It returned a sentence of death for the murder of Geddling and a sentence of life without possibility of parole for the murder of Benjamin.

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[1](...continued)
The panel expresses its appreciation to counsel for their professionalism.

On direct appeal, the California Supreme Court reversed one multiple-murder special circumstance, but found the error harmless. 806 P.2d at 1338. The court reversed both of the witness-killing special circumstances, but also found the errors harmless. *Id.* at 1324. In neither case did the court analyze specifically whether the error was harmless beyond a reasonable doubt.

In *Sanders*, we determined that California employed a "weighing" system for capital cases. A weighing death penalty regime is one in which "'the sentencer [is] restricted to a weighing of aggravation against mitigation' and 'the sentencer [is] prevented from considering evidence in aggravation other than discrete, statutorily-defined factors.'" *Sanders*, 373 F.3d at 1061 (alterations in original) (internal quotation marks omitted) (quoting *Williams v. Calderon*, 52 F.3d 1465, 1477 (9th Cir. 1995)).[2] Under a weighing system, "the jury's sentencing discretion

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[2]As explained further in *Stringer v. Black*, 503 U.S. 222 (1992), in a weighing death penalty regime, "after a jury has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence." *Id.* at 229. By contrast, in a non-weighing state, "the jury must find the existence of one aggravating factor before imposing the death penalty, but aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case." *Id.* at 229-30. In non-weighing regimes, "aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment . . . ." *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990). In such states, "the factfinder takes into consideration all

(continued...)

is not boundless – it must consider the defined list of aggravating factors." *Id.* at 1062. In weighing states, there is Eighth Amendment error (i.e., a lack of an individualized sentencing determination) "when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." *Id.* at 1059 (quoting *Sochor v. Florida*, 504 U.S. 527, 532 (1992)). Thus, as we noted in *Sanders*:

> an appellate court's invalidation of one or more of the sentencing factors may have a serious effect on individualized sentencing, because there is a real risk that the jury's decision to impose the death penalty rather than life imprisonment may have turned on the weight it gave to an invalid aggravating factor.

Id. at 1062.

Sanders held, however, on direct appeal that a remand for resentencing is not necessarily required to correct such an error. *Id.* at 1059. A state appellate court that invalidates an aggravating factor in a capital case may: "(1) remand for resentencing; (2) independently reweigh the remaining aggravating and mitigating circumstances under the procedure set forth in *Clemons v. Mississippi*, 494 U.S. 738 (1990), in which the state appellate court reweighs aggravating and mitigating

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[2](...continued)
circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant." *Stringer*, 503 U.S. at 230 (quoting *Zant v. Stephens*, 462 U.S. 862, 872, (1983)).

circumstances that have already been found by a jury to exist; or (3) independently conclude that the sentencing body's consideration of the invalid aggravating circumstance was harmless beyond a reasonable doubt." *Id.* at 1060 (internal citations and quotation marks omitted).

Even if a state appellate court has not conducted such an analysis, a petitioner is not automatically entitled to federal habeas relief. *Id.* To grant relief, we must first conduct a separate harmless error analysis pursuant to *Brecht*, 507 U.S. at 638, in order to determine whether the error "had a substantial and injurious effect" on the jury's verdict. *Sanders*, 373 F.3d at 1060 (citing *Morales v. Woodford*, 336 F.3d 1136, 1148 (9th Cir. 2003), *amended by* 388 F.3d 1159 (9th Cir. 2004)).

Thus, to prevail on the merits of his *Sanders* Eighth Amendment claim, Beardslee must demonstrate: (1) that his sentencing jury weighed an invalid special circumstance; (2) that the California Supreme Court did not properly review his claim by either independently reweighing the aggravating and mitigating factors or by finding the sentencing error harmless beyond a reasonable

doubt;[3] and (3) that the error had a "substantial and injurious effect or influence" on the jury's verdict.

II

A

Beardslee's penalty phase jury unquestionably considered invalid factors in reaching its death penalty verdict. Four death-qualifying special circumstances were presented to Beardslee's penalty phase jury: two witness-killing special circumstances and two multiple-murder special circumstances (one of each for the murder of Stacy Benjamin and one of each for the murder of Patty Geddling). The California Supreme Court invalidated both witness-killing special circumstances, since that special circumstance applies only to "the intentional killing of a person who witnessed a crime committed prior to, and separate from, the killing for the purpose of preventing the victim from testifying about the crime witnessed." *Beardslee I*, 806 P.2d at 1325 (citation omitted). For the witness-killing circumstance to apply, "[t]he crime witnessed cannot be deemed prior to, and separate from, the killing when both are part of the same continuous criminal

[3] The state appellate court also has a third option for correcting any constitutional error: remanding for re-sentencing. *Sanders*, 373 F.3d at 1060. The California Supreme Court did not do so in this case, so only the other two options will be discussed.

transaction." *Id.* (internal citations and quotations omitted). The California Supreme Court also held that Beardslee was erroneously charged with two multiple-murder special circumstances (one for each crime), which was impermissible double counting. *Id.* at 1339.

The California Supreme Court invalidated three of the four special circumstances in Beardslee's case, so there is no dispute that Beardslee's jury considered improper factors in reaching its death sentence. Thus, we agree with Beardslee that the jury improperly weighed invalid special circumstances in violation of the Eighth Amendment.

B

Given the jury's improper consideration of invalid special circumstances, the next question is whether that error was harmless. In determining whether the error was harmless, *Clemons*, *Stringer*, and *Sanders* require the state appellate court to undertake an independent analysis of the effect of the error on the jury's verdict. Thus, to prevail on this element of his Eighth Amendment claim, Beardslee must show that the California Supreme Court did not properly review the effect of the error by either reweighing the aggravating and mitigating factors without the invalid special circumstances or by determining that any error was harmless beyond a reasonable doubt. *Sanders*, 373 F.3d at 1060.

After invalidating the three special circumstances, the California Supreme Court found that the constitutional error was not prejudicial. *Beardslee I*, 806 P.2d at 1339. As to the additional multiple-murder special circumstance, the court stated:

> We have consistently found such double counting harmless because it did not result in the jury considering any inadmissible evidence. The jury knew there was a total of two murders. It is even more clearly harmless here since the jury returned a separate penalty verdict as to each murder. Each verdict form had only one multiple-murder finding attached to it. The jury imposed the death penalty only as to one of the murders.

Id. (citation omitted).

Although the California Supreme Court did not expressly find that the error was harmless beyond a reasonable doubt as required by *Clemons*, 494 U.S. at 753, it is evident from its discussion that the court analyzed the critical factors that led to its conclusion that the error was harmless. It was obvious to the jury that Beardslee had committed two murders, and the California Supreme Court recognized that the jury returned separate and distinct verdicts for each. In light of this explanation, the court's use of the "clearly harmless" language, and the court's consistent history of finding the double counting of multiple-murder special circumstances harmless beyond a reasonable doubt, we conclude that the California Supreme Court actually and properly determined that the jury's

consideration of one of the invalid multiple-murder special circumstances was harmless beyond a reasonable doubt.

As to the invalid witness-killing special circumstances, the court assessed the prejudice as follows:

> Defendant also contends the erroneous findings of the witness-killing special circumstance were prejudicial. Again, however, the jury properly considered all the *evidence*, including the motives for the murders. The court instructed the jury not to merely count the number of factors but to give each the weight to which it was entitled. We cannot conclude the jury could reasonably have given the inapplicable special circumstances any significant independent weight.

Id. (emphasis in original) (citation omitted). The above passages constituted the entire reweighing and harmless error analysis conducted by the California Supreme Court regarding the invalid witness-killing special circumstances.

In *Sanders*, we held that "[w]e cannot uphold a state appellate court's harmless error review as adequate when we have substantial uncertainty about whether the state court actually concluded that the invalid aggravating factor was harmless beyond a reasonable doubt." 373 F.3d at 1063. In *Sanders*, we held the California Supreme Court's review inadequate, noting that the court "never used the words 'harmless error' or 'reasonable doubt' in analyzing the effect of removing the special circumstance" and that the court seemed to have erroneously

applied the rule of *Zant v. Stephens*, 462 U.S. 862 (1983), which applies only in nonweighing states, upholding the verdict "despite the invalidation of two special circumstances because it was upholding other special circumstances." *Sanders*, 373 F.3d at 1064. Because the appropriate analytical framework was established by *Clemons*, which applies to weighing states, and not by *Zant*, we concluded in *Sanders* that the California Supreme Court "did not find, as it was required to do, that the error was 'harmless beyond a reasonable doubt.'" 373 F.3d at 1063.

In *Beardslee*, the California Supreme Court devoted only three sentences to its analysis of whether Beardslee was prejudiced by the invalid witness-killing special circumstances. As in *Sanders*, the California Supreme Court did not use the words "reasonable doubt." Unlike its discussion of the double-counted multiple-murder special circumstance, the California Supreme Court did not use the phrase "clearly harmless." To be sure, we do not require "a particular formulaic indication by state courts before their review for harmless federal error will pass federal scrutiny." *Sochor*, 504 U.S. at 540. However, it is apparent from the decision that the California Supreme Court did not consciously undertake an analysis of whether the error was harmless beyond a reasonable doubt. It would require too much inferential reasoning from the few terse statements in the opinion for us to conclude that the California Supreme Court was, in fact, conducting a

Chapman harmless error examination. *See id.* ("[W]hen the citations stop as far short of clarity as these do, they cannot even arguably substitute for explicit language. . . ."). It is certainly not possible to ascertain from the text of the court's opinion whether the court was analyzing the error under *Clemons*, rather than under *Zant*.

Therefore, we also agree with Beardslee that, as to the California Supreme Court's consideration of the witness-killing special circumstances, Beardslee's Eighth Amendment rights were violated, and the California Supreme Court did not undertake a proper independent review to determine whether the error was harmless.

III

In opposition to this conclusion, the State contends that *Sanders* was wrongly decided – that California is *not* a weighing state. However, a three judge panel cannot, absent exceptional circumstances not present here, overrule Ninth Circuit precedent. *See Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 983 (9th Cir. 2002) ("We are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.").[4]

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[4] *Sanders* is not yet final. The mandate has not issued and the time to petition for a writ of certiorari has not expired. Under other circumstances, we

(continued...)

The State also contends that application of *Sanders* is barred by *Teague v. Lane*, 489 U.S. 288 (1989). Subject to a few exceptions, *Teague* held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310. If *Teague* precluded relief in this case, it necessarily would have precluded relief in *Sanders*, which it did not.[5]

Regardless, *Sanders* did not create a new constitutional rule; it applied existing constitutional rules to California's death penalty system. If application of existing precedent determined that the holding "was required by the Constitution," then the *Teague* bar does not apply. *See Lambrix v. Singletary*, 520 U.S. 518, 527 (1997).[6]

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[4](...continued)
would exercise prudential caution and defer consideration of this issue until *Sanders* became a final decision. However, given that the State has established an execution date in this case prior to the time *Sanders* will become final, we must proceed under the current law of the Circuit.

[5] The State informed us at oral argument that it did not raise a *Teague* defense in *Sanders*. Thus, it contends that because the *Sanders* panel did not address *Teague*, the *Teague* question is properly before us.

[6] To the extent the State argues that *Sanders* is a new rule because *Clemons* has no application to California's sentence selection phase, the State is in effect
(continued...)

Sanders applied the Supreme Court's analysis in *Clemons* to California's death penalty statute. It did not create a new constitutional rule of criminal procedure; rather, it applied an existing one. Put another way, the determination that California was a weighing state within the meaning of *Clemons* did not establish a new rule of criminal procedure. The applicable rule was created by *Clemons* and its predecessors.

Most significantly, the Supreme Court has held that *Clemons* itself did not create a new rule of criminal procedure within the meaning of *Teague*. *Stringer*, 503 U.S. at 234-35. Indeed, in *Stringer*, the Supreme Court rejected an argument similar to the one made by the State in this case in holding that applying existing constitutional rules to different state sentencing schemes did not implicate *Teague*. *Stringer*, 503 U.S. at 229.

Clemons has been applied numerous times since it was announced. No circuit has yet determined that the application of *Clemons* to a different statutory scheme constituted a new constitutional rule of criminal procedure precluded by *Teague*. *See Coe v. Bell*, 161 F.3d 320, 334 (6th Cir. 1998); *Jones v. Murray*, 976 F.2d 169, 173 (4th Cir. 1992); *Smith v. Black*, 970 F.2d 1383, 1385 (5th Cir.

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[6](...continued)
arguing that *Sanders* was incorrectly decided, which is an argument that we cannot consider as a three judge panel.

1992). Thus, we conclude that *Sanders* did not announce a new rule of criminal procedure within the meaning of *Teague*, and Beardslee's claim is not *Teague*-barred.

IV

As we have noted, our determination that an Eighth Amendment error occurred does not automatically entitle Beardslee to federal habeas relief. "[W]e must also apply our own harmless-error analysis to determine whether the Eighth Amendment error had a substantial and injurious effect or influence on the jury's verdict." *Sanders*, 373 F.3d at 1064. That analysis is required by *Brecht*, 507 U.S. at 638. Under *Brecht*, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Thus, we have declined to grant federal habeas relief when a jury's consideration of an invalid special circumstance was harmless within the meaning of *Brecht*. *See Morales*, 388 F.3d 1159, 1172-73 (9th Cir. 2004). Under the circumstances presented here, we conclude that the Eighth Amendment error did not have a substantial and injurious effect on the jury's verdict.

As noted, the California Supreme Court invalidated both witness-killing special circumstances because the killing was part of "the same continuous criminal transaction," rather than a killing that was subsequent to, and separate from, the crime "for the purpose of preventing the victim from testifying about the crime witnessed." *Beardslee I*, 806 P.2d at 1325. The court reversed one of the two multiple-murder special circumstances as duplicative. *Id.* at 1339. Thus, the key question is whether the jury's consideration of the two witness-killing special circumstances had a substantial and injurious effect on its verdict.

Beardslee argues that invalid witness-killing special circumstances are inherently aggravating because they convey intent, cunning, goal-driven behavior, planning, and criminal propensity. In essence, Beardslee is suggesting that a penalty phase jury's consideration of an invalid witness-killing special circumstance amounts to structural error. However, we have previously applied a harmless error analysis to a jury's consideration of invalid special circumstances. *See, e.g., Williams v. Calderon*, 52 F.3d 1465, 1476 (9th Cir. 1995) (holding that an invalid kidnapping special circumstance finding was subject to harmless error review). There is nothing sufficiently unique about a witness-killing special circumstance, particularly when compared to the kidnapping special circumstance at issue in *Williams*, that would immunize it from harmless error analysis.

A careful examination of the penalty phase transcript and the verdict itself indicates that the witness-killing special circumstances did not play a significant role in the penalty phase jury's decision.

As Beardslee rightly points out, the prosecutor included the witness-killing special circumstances in his opening statement to the penalty phase jury. The prosecutor reminded the penalty phase jury that the prior jury had convicted Beardslee of two first degree murders with two special circumstances – multiple murders and witness killing – for each murder. The prosecutor also contended that Beardslee was determined to cover up or destroy all evidence of what had happened in his apartment, an argument that could be construed as supporting the special circumstance. The prosecutor also argued that Beardslee considered killing Bill Forrester because he too was a potential witness. According to the prosecutor, the only fear that Beardslee had was the fear of being caught by the police for what happened in his apartment. Therefore, the prosecutor reasoned, Beardslee had to get rid of not just the physical evidence, but also both women. The prosecutor contended that Stacy Benjamin had to be killed not only because she was a witness to the crimes in Beardslee's apartment, but also because she was a witness to the events leading up to Patty Geddling's murder.

However, significantly, virtually all of these arguments could have been made to the jury even if the special circumstance verdict had not existed because the prosecutor was entitled to discuss the circumstances of the crimes. Further, although the prosecutor mentioned the witness-killing special circumstances and related matters in his opening statement, his opening centered around other aspects of the case. He emphasized that Beardslee was responsible for three murders: two in California and one in Missouri. He argued that the separate circumstances of each murder showed "evilness and depravity," demonstrating that Beardslee was a "cold-blooded murderer." He underscored the "unspeakable depravity and callousness" in the "very brutal murders, each one unique in the way they were slaughtered." The prosecutor highlighted the fact that Patty Geddling had begged for her life before she was killed, and that Beardslee had done it alone, later telling his cohort Frank Rutherford that he had "to finish" when others backed out. The prosecutor emphasized that Beardslee acted alone when he killed Geddling.

The prosecutor also told the jury that Beardslee murdered Benjamin when Rutherford's attempts had been unsuccessful, and that Rutherford and Beardslee had agreed on the plan to murder Benjamin. The prosecutor further informed the jury of the circumstances surrounding the prior Missouri murder, concluding with

the statement that "[t]hree murders is enough." In context, the witness-killing circumstance played a small part in the prosecutor's opening statement.

At the penalty phase, approximately twenty-eight witnesses testified over some 748 pages of transcript. The witness-killing special circumstances were specifically addressed in only a handful of transcript pages, involving a little over 500 transcript lines out of over 19,000 lines of transcript. The bulk of the prosecution evidence was directed at the circumstances of the crime and Beardslee's prior murder in Missouri.

The witness-killing theory was discussed specifically with just one witness, defense psychiatrist Dr. Wilkinson, who spoke directly to the prosecution's theory that Beardslee killed these women because they were witnesses to crimes that had occurred in Beardslee's apartment. After the defense elicited testimony from Dr. Wilkinson that there was no logical or easily understandable motive for the murders, the prosecutor attempted to establish his witness-killing theory on cross-examination. However, over nineteen pages of transcript, Dr. Wilkinson consistently rebuffed this theory. Although Dr. Wilkinson agreed that witness-killing was a conceivable motive, he strongly disagreed that this theory explained these murders. Among other reasons, Dr. Wilkinson noted that there were many other people involved in the incident who were not killed, so the theory did not

make practical sense. Dr. Wilkinson never retreated from his primary theory that psychological considerations were the primary motivating factor.

After Dr. Wilkinson's testimony, the prosecutor all but abandoned the witness-killing theory as a rationale for imposing the death penalty. In his closing argument, he briefly referenced the two witness-killing special circumstances found by the guilt phase jury and referred to the witness-killing theory during the initial part of his closing. However, the prosecutor never urged the jury to impose the death penalty based on the theory of witness-killing. To the contrary, the prosecutor's primary arguments for death were that Beardslee deserved to die because of the gruesome circumstances of the women's deaths, Beardslee's dangerousness, the fact that Beardslee had killed before, and that Beardslee had no defenses to the two murders. Aside from the brief mention of the special circumstances at the beginning of his closing argument, there is nothing in the prosecutor's closing remarks that would have been precluded by the elimination of the invalid special circumstances findings.

Defense counsel did not discuss the witness-killing special circumstances in his closing. Rather, he argued the central defense theory that Beardslee was mentally impaired and driven in his actions by fear of Rutherford. He highlighted

Beardslee's good qualities, indications of compassion, his ability to be rehabilitated, his good work performance, and his history of mental difficulties. In short, little attention was paid during closing arguments to the special circumstances in question.

In sum, when the penalty phase trial is examined in its entirety, very little would have been altered if the witness-killing special circumstances had been omitted from consideration. All of the gruesome details of the crime would have been admitted, evidence of the prior Missouri murder would have been introduced, the circumstances showing premeditation and planning would have been presented, and the testimony concerning Beardslee's lack of remorse would have been heard.

However, perhaps the most persuasive indication that the witness-killing special circumstance findings played little role in the jury's deliberation is the verdict itself. The jury imposed the death penalty for the murder of Patty Geddling but not for the murder of Stacy Benjamin. Both women were witnesses to the initial shooting of Patty Geddling, but the jury returned death for the murder of one, but not the other. Geddling was the initial victim. She was the one first shot by Rutherford. At trial, both parties proceeded under the assumption that Rutherford's shot was the result of an accidental discharge of the shotgun.

Beardslee took Geddling away from the apartment on the pretext of transporting her to a hospital; instead, he took her into a wooded area and shot her in the head at point blank range with a gun he brought with him from the apartment.

Had the jury attached significance to the theory that Beardslee killed both women because they were witnesses to a crime, the jurors would have likely imposed a death sentence for both murders. Alternatively, because Stacy Benjamin witnessed both the accidental shooting of Patty Geddling in the apartment and had knowledge of Geddling's subsequent murder, in theory the jury would have been more likely to return a death sentence for the murder of Stacy Benjamin. Instead, the jury imposed a death sentence for the crime in which Beardslee was the primary actor, but not for the crime in which Beardslee was a participant.

The jury viewed the murder of Geddling differently, and the circumstances of the two crimes were different. Beardslee administered the directly fatal shots to Geddling; Rutherford was not present, a fact that the prosecutor highlighted in his closing argument. Thus, the mitigating factor of Beardslee's fear of Rutherford – one of the primary theories urged by the defense – arguably was not present. Indeed, this contravenes Beardslee's argument that the witness-killing special circumstances prevented the jury from giving weight to the mitigation evidence.

As the prosecutor emphasized in closing, the course of events surrounding the Geddling murder indicated that Beardslce acted out of deliberate, conscious choice.

In contrast, Rutherford initiated the killing of Benjamin by strangling, and Beardslee assisted. The most logical explanation for the split verdict is that the jurors considered the mitigating factors significant as to the crime in which Rutherford was present, but did not consider those factors sufficiently mitigating for Geddling's murder, when Rutherford was absent. However, we need not resort to inference or conjecture. The plain fact is that the jury differentiated between the circumstances surrounding the two crimes; therefore, it was the difference between the crimes that was crucial, not the commonality of any particular aggravating factor. As such, it is not possible to conclude that the common special circumstance of witness-killing was a substantial factor in the jury's decision to impose the death penalty for the murder of Geddling but not for the murder of Benjamin.

For these reasons, we are not left with grave doubt about whether the jury's consideration of the invalid special circumstances had a substantial and injurious effect on the jury's verdict. Even if the two witness-killing and one multiple-murder special circumstances had been removed from consideration, as they

should have been, the presentation of evidence and argument during the penalty phase would not have been materially different. Further, the jury's verdict of life without parole for one murder and the imposition of the death penalty for the other indicates that the invalid special circumstance applicable to both crimes did not substantially influence the jury's ultimate verdict. We affirm the judgment of the district court denying Beardslee's petition for a writ of habeas corpus.

AFFIRMED.

COUNSEL

Michael Laurence, Barbara Saavedra, Susan Garvey, San Francisco, California, attorneys, for petitioner-appellant.

Dane R. Gillette, Deputy Attorney General, San Francisco, California, for respondent-appellee.

APPENDIX 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD BEARDSLEE,

Petitioner - Appellant,

v.

JILL BROWN, Warden of the California State Prison at San Quentin,

Respondent - Appellee.

No. 01-99007

D.C. No. CV-92-03990-SBA

ORDER

Before: TASHIMA, THOMAS, and PAEZ, Circuit Judges

Donald Beardslee's motion for a stay of execution pending the filing of a petition for a writ of certiorari to the United States Supreme Court is denied, without prejudice to the filing of the request with the United States Supreme Court.[1]

MOTION DENIED.

[1] Beardslee has filed a separate request for a stay of execution in *Beardslee v. Woodford, et. al.*, No. 05-10542, which is still pending.